

**OPINION**  
**65-459**

October 7, 1965           (OPINION)

Mr. Vernon S. Cooper, Secretary-Treasurer

Garrison Diversion Conservancy District

RE: Waters - Garrison Conservancy District -

Ownership of Land

This is in response to your letter in which you advise that the Garrison Diversion Conservancy District is in the process of discussing repayment contracts with the Bureau of Reclamation, an agency of the United States. The project under discussion will include the restoration of Devils Lake, which is a major recreational development planned in connection with the project. The present proposed contract calls for a contribution on the part of the Conservation District. The Conservancy District deems it advisable to meet the contribution requirements by furnishing land surrounding Devils Lake.

You then call our attention to the Rutten case, (Raymond Rutten v. State of North Dakota, The Garrison Diversion Conservancy District and State Water Conservation Commission, 93, N.W. 2d. 796). You also state in view of the need to determine the State's right to lands in the Devils Lake area for the purpose of entering into proposed contracts, you would appreciate an opinion on the following question:

Will the State of North Dakota continue to maintain the position it took in Rutten v. State of North Dakota, that the high water mark for Devils Lake is a least 1,425, and possibly some higher elevation approaching the meander line of 1,437."

The Rutten case was presented to the Court on a stipulation. The Court confined itself primarily to the stipulation submitted and noted that there is no other evidence before the Court. Nevertheless, the Court did take judicial notice that for a period of about ten years (1929 to 1940) the area of Devils Lake and the State as a whole sustained the longest and most severe drouth known in our recorded history.

It is significantly noted the Garrison Diversion Conservancy District was a party-defendant in the Rutten case. Because the Garrison Diversion Conservancy District is a principal party in the proposed contract, it is very unlikely that the contention made in the Rutten case would be altered should a similar question be raised. This is particularly true in view of the decision of the Court in the case. The Court in effect held that the plaintiff failed to sustain the burden of proof resting upon him and the defendants failed to prove the existence of an ordinary high water level of the lake in excess of 1,419 feet above normal sea level. The defendants primarily asserted that the ordinary high water mark of Devils Lake should be

set at 1,425, whereas the plaintiff contended that the ordinary high water level should be set at 1,419 feet above meander sea level. The merits of the case were not decided.

It is, however, significant to note that the plaintiff claimed title to certain land by reason of reliction. The Court in dismissing the action made this comment: "The evidence before the court fails to warrant the conclusion that there has been a permanent reliction to the present level of the lake, or that the waters in the lake will never again reach some higher level." It is thus observed that the Court rejected the contention of the plaintiff, at least on the evidence submitted that there was a permanent reliction. Consequently, this question is still unresolved.

We assume that the stipulation was predicated upon undisputable facts and that if a similar case were submitted to the Court the same facts which served as a basis for the stipulation would be proved or again agreed upon. We would also assume that in view of what the Court stated that other evidence would be available to support the contentions made in the Rutten case.

In addition to the other questions involved, it is also observed that the defendants contended that even if the riparian owner could successfully claim title to the ordinary low water mark that such title was not absolute except as to the ordinary high water mark, and that the intervening area between the low water mark and high water mark was subject to a public right or use for public purposes, particularly a purpose in connection with the use of the lake which is a navigable lake.

A number of Court decisions in the State of South Dakota on this particular question held as follows:

\* \* \* It is our opinion, and we so hold, that, as to the strip of land below ordinary high-water mark, the title of the appellants is subject to the superior right of the public, that the state has the right to raise the water in the manner provided by chapter 18, Laws of 1913, and to maintain it at such ordinary high-water mark, by either natural or artificial means, and that such damage, if any, as may result to the appellants as riparian owners, is a damage for which they are not entitled to recover."

(Anderson v. Ray, 156 N.W. 591.)

In a somewhat similar case the South Dakota Supreme Court in Hillebrand v. Knapp, 274, N.W. 821, held that:

Owner of land contiguous to lake which was ordinarily navigable did not acquire right of ownership by accretion or reliction to land below low-water mark when lake was temporarily dry since drying up did not result in gradual and imperceptible increment to lands of owner which is a necessary element where title is acquired by 'reliction'."

In a similar case, Flisrand v. Madson, 152 N.W. 796, the Court said:

\* \* \* While the title of the riparian owner on navigable or public waters extends to ordinary low-water mark, still his title is not absolute, except to ordinary high-water mark, and as to the intervening shore space between high and low water mark the title of the riparian owner is qualified or limited by and subject to the rights of the public. \* \* \*."

While these cases are South Dakota cases, we deem them to be of prime importance because the State of South Dakota was admitted to the Union in the year 1889 under the same Enabling Act and provisions, and at the same time as the State of North Dakota. Also, while these decisions might not be absolutely controlling, we believe significant weight will be given to them on similar questions. In any event, the Rutten case did not decide any of these points involved. Thus in direct response to your question, it is our opinion that the State of North Dakota would continue to maintain the position it took in the Rutten case or possibly claim that the high water mark was higher, somewhat in the area between 1,425 and the meander line of 1,437. The land involved would still be claimed as belonging to the State.

While the State of North Dakota and the Garrison Diversion Conservancy District have common objectives, the Garrison Diversion Conservancy District is not yet authorized by law to convey or transfer any interest to the land surrounding Devils Lake. Before such transfer or conveyance could be legally accomplished it would require legislation authorizing said Conservancy District to act as an agent for the State in transferring or conveying certain interests in the land in question. It is common practice in this State for the Legislature to designate some agency to act for and in behalf of the State on matters such as this.

Being that the objectives are in complete harmony with previous expressions of the Legislature pertaining to the Garrison Diversion Conservancy District project, of which the present proposed project is a part, it is presumed that the Legislature will act consistently with the previous expressions and grant what authority is necessary to implement and complete the Garrison Diversion project.

HELGI JOHANNESON

Attorney General